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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 944

INTER-OCEAN CASUALTY COMPANY,
Petitioner,

vs.

BESSIE BROCKMAN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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No. 944

INTER-OCEAN CASUALTY COMPANY,
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vs.

BESSIE BROCKMAN.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Inter-Ocean Casualty Company prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on December 1, 1941, affirming the judgment of the United States District Court for the Northern District of Texas, Dallas Division, dated January 23, 1941, for recovery by respondent against petitioner of the sum of $3,374.00, with interest thereon from that date at the rate of 6% per annum, and all costs of suit.

Opinions Below.

The judgment of the District Court is shown in the record at page 17, but that court did not write an opinion. The opinion of the Circuit Court of Appeals is reported in 123 F. (2d) p. 1006.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on the first day of December, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Section 347, U. S. C. A.).

Summary Statement of the Matter Involved.

Respondent filed this suit October 15, 1940, on policy of accident and health insurance which conditionally provided for monthly indemnity for loss of time. She sued on the accident clauses of the policy, the insuring clause relative to accident being:

> "For loss resulting, without contributing cause, from accidental bodily injuries."

Suit was for indemnity of $100.00 per month for the period September 30, 1938, to date of trial, together with statutory penalties, attorney's fees, and interest.

Respondent alleged she sustained an accidental bodily injury from the lifting of a patient in a hospital on or about September 5, 1938 (R. 2), which injury she alleged to be a rupture of the lumbosacral disc (R. 7); total and continuous disability, but did not allege nor contend it was permanent; regular attendance by a legally qualified physician; proof of loss by giving notice of injury under date of October 4, 1938, and by two letters dated February 10, 1939, and March 30, 1939, respectively, written by Dr. A. R. Thomasson to petitioner, and by a further report accompanied by statement of Dr. O. W. Gibbons, dated May 16, 1939 (R. 3). She did not allege proof of loss for any period of time subsequent to May 16, 1939, but alleged that petitioner denied liability and waived proofs.

Petitioner admitted the receipt of the letters and reports alleged by respondent, but denied these constituted proofs

of loss as required by the policy, and denied that it had waived proofs of loss. It resisted the suit with the plea that there was no accidental bodily injury; that respondent had not complied with the terms and conditions of the policy and had not furnished proofs of loss as required by the policy; that a compliance by insured with the terms and conditions of the policy was a condition precedent to recovery on the policy, and that respondent by virtue of her failure to comply with the terms of the policy, had forfeited her right to indemnity (R. 12-16).

The policy provided for payment of $100.00 indemnity monthly, if the injury within 30 days from date of accident continuously and totally disabled the insured, and if the insured should be regularly attended by a legally qualified physician (R. 9); that the insured should furnish affirmative proofs of loss within 90 days (or within the minimum period allowed by law), after the termination of the period for which the company was liable, and that the indemnity should be payable each thirty days subject to due proofs of loss; that strict compliance on the part of the insured with all the terms and conditions of the policy should be a condition precedent to recovery, and that any failure in that respect should forfeit to the petitioner all rights to any indemnity, and that no waiver of any of its provisions shall be valid unless agreed to in writing by an executive officer of the company and attached to or endorsed on the policy (R. 10, 22).

On trial of the cause the only evidence offered on the question of whether the alleged injury was accidental, was respondent's testimony that while she was lifting an anaesthetic patient from a hospital carriage to a bed she had a severe pain in her back which ran down into her leg and that she had difficulty straightening up (R. 55), and that the patient was too large for them to lift (R. 70), and that she had heard of other people hurting their backs (R. 63).

No evidence was offered to show anything unforeseen, unexpected, and unusual that accompanied the voluntary act of respondent and produced the alleged injury.

There was no positive evidence of rupture of the disc, but only evidence for a speculation and conjecture. There is no basis for presumption of rupture, but there is evidence affording a reasonable presumption that no rupture could have occurred under the circumstances.

Only two proofs of loss were furnished by respondent, dated October 4, 1938, and May 16, 1939, respectively. These related to the claimed accident. Other proof forms for reporting accidental injury disability and for reporting illness disability were furnished respondent, but they were not completed and returned to petitioner. No proofs of loss were furnished for any period subsequent to May 16, 1939, but recovery was allowed to December 30, 1940.

For the purpose of showing waiver of proofs of loss, respondent introduced in evidence letters written by petitioner to respondent (R. 79-82, 84, 86, 90, 94).

The court charged the jury that "accidental injury is an unintended result of an intended act (R. 134). Petitioner excepted to the charge but the court overruled the exception (R. 138). Petitioner requested the court to charge the jury that "if the injury followed in a usual or reasonably to be expected way from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected" (R. 138). The court refused to give the requested charge.

The cause was tried on January 22, 1941, resulting in a verdict in favor of respondent for 27 months disability (R. 17), and judgment, dated January 23, 1941, against petitioner for the sum of $3,374.00, with 6% interest from that date.

Petitioner's motion for directed verdict was overruled (R. 16, 132), as was also its motion for judgment notwith-

standing the verdict, and, in the alternative, for a new trial (R. 18, 21).

Upon appeal the cause was submitted in the Circuit Court of Appeals November 11, 1941, which court on December 1, 1941, affirmed the trial court's judgment. Petition for rehearing was duly filed on December 20, 1942, but was overruled January 12, 1942, without written opinion. Motion for stay of mandate was filed in the Circuit Court of Appeals on January —, 1942, and was granted January 19, 1942.

Questions Presented.

1. Is proof of injury alone, without proof that something unforeseen, unexpected and unusual accompanied the voluntary act of respondent and produced the alleged injury, sufficient to show accidental bodily injury within the meaning and intent of the policy provision?

2. Without direct, positive evidence of a ruptured disc, and no basis for a legal presumption to be indulged that there was a rupture, the respondent having alleged a rupture of the disc as a basis for her claim for indemnity, did respondent meet the burden of proof so as to give support for verdict and judgment?

3. Liability for indemnity is predicated on proof of disability and loss resulting from accidental bodily injury, and claim for indemnity is based on alleged accidental injury from a voluntary act of claimant. On the issue of accidental bodily injury the court charged the jury as follows:

> "I charge you that accidental injury is an unintended result of an intended act. In order to make it applicable to this particular condition here, that is, she claims that she was assisting in the removal of the patient from the carriage to the patient's bed, and while in that act that she hurt her back. You see, she intended to move the patient, she did not intend to have

> it hurt her back. That is an intended act accompanied by an unintended result" (R. 134).

Petitioner excepted to the charge, but the court overruled the exception (R. 138). Petitioner requested that the court charge, in substance at least, as follows:

> "If the injury followed in a usual or reasonably to be expected way from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected" (R. 138),

but the request was refused (R. 138).

Respondent had testified that she had heard of other people getting their backs hurt, and that the patient was too large to lift.

The question is whether the court should have charged the jury as requested by petitioner.

4. The insurer furnished form for making proof of loss for accident disability, which was sent in October 10, 1938, but not completed with full information requested. November 29, 1938, insurer furnished insured with additional form for proof of accident disability, requesting its completion and offering to pay accrued indemnity upon completion of proof, but insured did not complete or return it. February 13, 1939, insurer furnished insured with another form but insured did not complete and return it, and on February 25, 1939, insurer, because it considered the claim as one for illness disability, and so advised the insured, furnished the insured with form for proof of illness disability, which insured and her doctor refused to complete and return. March 25, 1939, insurer explained why it had furnished form for proof of illness and stated it would be glad to make adjustment of claim upon submission of necessary proof, and sent another illness form, which insured refused to complete and return. April 11, 1939, insurer sent draft for a period of disability and another illness proof form. April 17, 1939, insured's attorney made de-

mand that insured be paid the sum of $100.00 per month, each and every month, as provided in the policy. On April 19, 1939, insurer furnished insured with another form for proof of accident disability, and on May 8, 1939, wrote insured's attorney regarding the completion of that form and suggested that if insured desired the accrued benefits paid at that time, to please complete the proof. The form was filled in and returned to insurer on May 17, 1939, who on May 22, 1939, requested insured to send insurer a quotation of Section 2, Part "A" of the policy, upon receipt of which insurer would give definite answer as to liability. Insured did not comply with this request but filed suit in the State court (later dismissed), where by deposition taken by insured, insurer's Claim Manager contended the claim should be under the illness clauses of the policy, and said that the claim would be paid under those clauses upon completion of proof (R. 74-98, 124-128).

The question is, whether under these circumstances insurer repudiated the contract.

5. The policy provides for monthly accident indemnity, subject to insured's furnishing affirmative and due proofs of loss showing continued disability. It provides that such proofs are a condition precedent to liability, and must be furnished within 90 days (or within the minimum period allowed by law) after the termination of the period for which insurer is liable. There was no contention and no evidence that the alleged disability was permanent. The insured executed and sent to insurer only two proof of loss forms, the first dated October 4, 1938, and the last dated May 16, 1939, but recovery was allowed for the periods from May 16, 1939, to December 30, 1940. Since petitioner's liability for indemnity arises only on performance by respondent of the condition precedent that she furnish petitioner with affirmative and due proofs of loss, and since she failed to furnish such proofs for any period

subsequent to May 16, 1939, the question is whether recovery could be had for the periods from May 16, 1939, to December 30, 1940.

Reasons Relied On for Allowance of the Writ.

1. The Circuit Court of Appeals has decided important questions of law contrary to the general principles of law and in such a way as to conflict with the applicable local decisions, as well as with decisions of other Circuit Courts of Appeals and of the United States Supreme Court.

2. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned a departure by the trial court, as to call for an exercise of this Court's power of supervision. The decision is without evidence to support it, and it disregards valid and subsisting terms and conditions of the contract, allowing a recovery without right thereto and contrary to the contract.

3. The Circuit Court of Appeals has held in this cause that under an insurance policy providing for indemnity on account of disability from accidental bodily injury, proof of injury alone is sufficient to show that there was an accident, and that it is unnecessary to prove the existence of anything unforeseen, unusual and unexpected, accompanying the voluntary act of the injured person, that produced the injury.

We believe this holding is in conflict with that of this Court in *Mutual Accident Association* v. *Barry,* 131 U. S. 100, and also with the holding of the Circuit Court of Appeals, 9th Circuit, in the case of *Aetna Life Insurance Company* v. *Portland Gas & Coke Company,* 229 F. (1) 552, and *New York Life Insurance Company* v. *Ollich,* 42 F. (2) 399, Circuit Court of Appeals, 6th Circuit. It is also in conflict with the holding of the Supreme Court of Texas in the case of *Bryant* v. *Continental Casualty Company,* 182 S. W.

(1) 673, and the case of *International Travelers Association* v. *Francis,* 23 S. W. (2) 282.

4. The decision of the Circuit Court of Appeals is in conflict with the universal holding of courts that a verdict and judgment must be supported by the evidence, in that the court affirmed the judgment of the trial court though there was no evidence that the alleged injury was accidental, and none of a ruptured disc.

5. The decision of the Circuit Court of Appeals in this cause is contrary to the general principles of law governing charges to the jury in the trial of cases involving the issue of accidental bodily injury, in that it affirmed the trial court in its charge to the jury that accidental injury is an unintended result of an intended act, and affirmed the trial court's refusal to charge the jury, at the request of petitioner, that if the injury followed in a usual or reasonably to be expected way from the means voluntarily employed, that is, the given voluntary act, it is not a result accidentally effected.

The requested charge is the law as declared and held by the Supreme Court of Texas. *Bryant* v. *Continental Casualty Company,* 182 S. W. (1) 673; *International Travelers Association* v. *Francis,* 23 S. W. (2) 282. In the case at bar there was testimony which, if true, shows the claimed injury from the voluntary act of respondent in lifting the patient followed in a usual or reasonably to be expected way and was the natural and probable consequence of the voluntary act.

6. The decision of the Circuit Court of Appeals in this cause is in conflict with the decisions of this Court in the case of *Mobley* v. *New York Life Insurance Company,* 295 U. S. 632, and *New York Life Insurance Company,* v. *Viglas,* 297 U. S. 672, and the decision of the Circuit Court of Appeals, Fifth Circuit, in the case of *Mobley* v. *New York*

Life Insurance Company, 74 F. (2) 558, and the decision of the Circuit Court of Appeals, Tenth Circuit in *Kimel, et al.* v. *Missouri State Life Insurance Company*, 71 F. (2) 921, and with applicable Texas decisions, on the question of whether under the facts in this cause there was a repudiation of the contract by petitioner.

7. The decision of the Circuit Court of Appeals is in conflict with decisions of this Court, and Circuit Courts of Appeals, and applicable local decisions, on the question of whether recovery may be had for the periods of alleged disability from May 16, 1939, to December 30, 1940, for which no proofs of disability were furnished, though required as a condition precedent to liability.

8. The decision of the Circuit Court of Appeals has made erroneous findings of fact, and has erroneously construed the legal effect of the evidence, and has disregarded valid and subsisting terms and conditions of the policy sued on, and has failed to apply the rules of law as pronounced by local decisions and decisions of this Court applicable to the facts in this cause.

Conclusion.

Wherefore, we respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

Dated January 31, 1942.

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